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International Law and the Protection of Cultural Property in Armed Conflicts

By STANISLAW E. NAHLIK*

Introductory Remarks

THROUGH innumerable centuries nations saw war as a perfectly normal phenomenon, and the right to make war (*jus ad bellum*) was generally considered to be inherently linked with the very concept of sovereignty. In the late 19th and early 20th centuries, nations endeavored to regulate, through conventions, only the means of conducting war, attempting to make warfare more humane. Comparatively recently, though, the international law of war changed radically, first when the Kellogg Pact¹ prohibited any recourse to war, and later when the United Nations Charter² extended this prohibition to both the use and the threat of force.

The question then arose, quite naturally, whether there is any purpose in regulating the means of conducting war (generally called *jus in bello*) if war itself is illegal. The opinion prevailed, however, that to be realistic international law must provide this "second line of defense." Armed conflicts *do* occur, even if they are no longer labeled "wars." Nations must observe some minimum standard of conduct, which, indeed, has often been observed, if for no other reason than fear of retaliation. Furthermore, should any of the rules of such conduct be violated, not only may the state be subjected to retaliation, but the guilty individuals as well may now be brought to justice, not merely before a municipal court, but also, as the Nuremberg Trial³ demonstrated, before

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1. Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, art. I, 46 Stat. 2343, 2346 (1929), T.S. No. 796, 94 L.N.T.S. 57, 63.

2. U.N. CHARTER art. 2, para. 4.

3. See 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS (1949).

an international court. Action of this type would be impossible without the existence of rules of conduct.

One must, of course, bear in mind that under the technological conditions of a modern armed conflict it may prove extremely difficult to apply some of the rules of the law of war.⁴ But *difficult* does not necessarily mean *impossible*. Even so, those responsible for the conduct of hostilities should spare no effort to preserve at least the most important among human values.

The ingredients of the conventional law of war are highly diversified, and one can divide them into several categories. For the purposes of this study, the most essential division is between rules which protect certain groups of persons and those which protect things.

It is sometimes argued that rules belonging to the former group are far more important than those of the latter.⁵ This assertion may be true about objects which have merely a material or financial value. If destroyed they can generally be replaced, sometimes, ironically, to the benefit of the apparent loser, who may receive more up-to-date equipment or machinery than that destroyed. But there is no possibility of replacement with respect to most of those objects which qualify as cultural property. Their value often consists in their very uniqueness, which makes them irreplaceable. I thus emphatically disagree with the contention of some writers, like a leading German lawyer,⁶ that when nations are at war, "the work of art of the human life" (*das Kunstwerk des menschlichen Lebens*) is so far superior in value to "the work of art from the human hand" (*das Kunstwerk aus menschlicher Hand*), that one cannot ask the belligerent parties to pay much attention to the protection of the latter. How profoundly untrue! I would not risk reversing the above-quoted opinion, but one *could* argue that all men, sooner or later, must die, whereas a work of art of outstanding value may and should live forever, *provided* it is properly protected.

Historical Background: Rules Prior to the 1954 Convention

Throughout the history of wars, wanton destruction and indiscrimi-

4. For the sake of convenience, the term "law of war" will sometimes be used instead of the proper modern term "law of armed conflict."

5. As a consequence, the protection of cultural property is sadly neglected in some textbooks. See, e.g., *MANUAL OF PUBLIC INTERNATIONAL LAW* 799-844 (M. Sørensen ed. 1968) (45-page discussion of the law of war, with only *two* lines devoted to the convention on protection of cultural property).

6. See F. VON LISZT, *DAS VÖLKERRECHT SYSTEMATISCH DARGESTELLT* 457 (12th ed. 1925).

nate pillage of enemy property, whether public or private, seemed inseparably linked to any war. What is now called cultural property was no exception to the harsh laws of war, which, within the ancient and medieval meaning of the term, were tantamount to boundless license for any belligerent.⁷ Some modest limitations were claimed concerning churches and other sacred objects, but with little effect.

The ideology of the Renaissance and, to an even greater extent, that of the Enlightenment,⁸ slowly brought about progress which was reflected in the practice of most wars during the 18th century. It thus came as a shock when the French, in the course of the Napoleonic wars, systematically pillaged the most valuable works of art wherever they went to enrich the newly-created Musée Napoléon or the Louvre.⁹ Another shock came in 1814 when the English, allegedly in retaliation for a few minor incidents which had occurred at the frontier between Canada and the United States, mercilessly bombarded several American towns, including Washington.¹⁰ These occurrences, however, served as examples of the degree to which general opinion had changed from the time when such acts were regarded as perfectly normal. As to the Napoleonic spoils, the Allies, after defeating the emperor, ordered the works of art returned to their rightful owners;¹¹ the bombardment of Washington was soon vigorously condemned in the British Parliament.¹²

One can thus state that in the 19th century, the opinion already prevailed that: "the arts and sciences are admitted amongst all civilized nations to form an exception to the severe rights of war, and to be

7. See generally, S. NAHLIK, GRABIEŻ DZIEŁ SZTUKI [PILLAGES OF WORKS OF ART] 9 (1958) [hereinafter cited as NAHLIK]; W. TREVE, ART PLUNDER (1961); Nahlik, *La Protection internationale des biens culturels en cas de conflit armé*, in 120 *ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS* 66-81 (1967) [hereinafter cited as Nahlik, *La Protection*].

8. A number of authors have written on the subject. See generally, NAHLIK, *supra* note 7; Nahlik, *La Protection*, *supra* note 7. The first among them seems to have been a Pole of the 16th century. See J. PRZYŁUSKI, *LEGES SEU STATUTA AC PRIVILEGIA REGNI POLONIAE OMNIA HACTENUS MAGNA EX PARTE VAGA, CONFUSA ET SIBI PUGNANTIA* (1553). The views of the Enlightenment were most emphatically expressed by E. de Vattel. See E. DE VATTEL, 2 *LE DROIT DES GENS* 139-40 (1758) [3 *THE LAW OF NATIONS* 293-94 (1758)].

9. Much has been written on this subject in the United States. See, e.g., F. TAYLOR, *THE TASTE OF ANGELS* 539-41 (1948); Quynn, *The Art Confiscations of the Napoleonic Wars*, 50 *AM. HIST. REV.* 437 (1945).

10. See 7 J. MOORE, *A DIGEST OF INTERNATIONAL LAW* 182-86, 199-203 (1906).

11. The point of view of the allies was best expressed in a note circulated on September 11, 1815, by the British Foreign Secretary, Viscount Castlereagh. See Martens *Nouveau Recueil* (ser. 1) 632 (1887).

12. The principal speaker on the subject was Sir James Mackintosh. See 7 J. MOORE, *A DIGEST OF INTERNATIONAL LAW* 200 (1906).

entitled to favour and protection."¹³ No wonder then that the rules regarding protection of cultural property, already firmly established in practice and in doctrine, and thus in customary law, have appeared, since the middle of the 19th century, in all the consecutive stages of the codification of the laws of war.

A primary source of inspiration was the instructions for the United States Army, drafted in 1863 by Professor Francis Lieber.¹⁴ A declaration signed by several governments at Brussels on August 27, 1874,¹⁵ and a manual of the rules of land warfare, drafted in 1880 by the Institute de Droit International,¹⁶ paved the way for an official codification, which was accomplished at the two peace conferences convened at The Hague in 1899 and 1907.

The second convention¹⁷ signed at the first conference and the fourth¹⁸ signed at the second conference were both concerned with the laws and customs of land warfare (*lois et coutumes de la guerre sur terre*) and are both pertinent to our subject. Annexed to both of them were the Regulations on the Laws and Customs of War on Land, which have formed until now the most important basis for the law of armed conflict in force among all states. According to the Nuremberg International Military Court, the regulations acquired, both in practice and in general opinion, the force of a general custom to such a degree as to be binding also on those states which are not formally parties to them.¹⁹ It is thus necessary to mention here those regulations which concern the protection of cultural property. We shall limit ourselves to the rules contained in the 1907 regulations,²⁰ since they are but a slight redraft of those already established in 1899.

13. See *id.* at 460. The attitude discussed was that of Sir Alexander Croke, of the Halifax Vice-Admiralty Court in a case regarding the capture by a British vessel of paintings and prints destined for the Academy of Arts in Philadelphia. See *id.*

14. General Order No. 100, Apr. 14, 1863, in 3 U.S. DEPT. OF WAR, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (ser. III) 148 (1902).

15. Actes de la Conférence réunie à Bruxelles, du 27 juillet au 27 août 1874, pour régler les lois et coutumes de la guerre, 4 Martens Nouveau Recueil (ser. 2) 1 (1879).

16. INSTITUTE DE DROIT INTERNATIONAL, LES LOIS DE LA GUERRE SUR TERRE (1880).

17. See Convention with Certain Powers, with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (1903), T.S. No. 403.

18. See Convention with Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (1911), T.S. No. 539 [hereinafter cited as 1907 Convention].

19. 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 463-64 (1949).

20. Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295 (1911), T.S. No. 539 [hereinafter cited as 1907 Regulations].

Provisions bearing on the protection of cultural property appear in two different chapters of the 1907 regulations: section two, on hostilities, and section three, on occupation of enemy territory.²¹

The former, in enumerating prohibited means of injuring the enemy, forbids, among other things, the destruction or seizure of the enemy's property unless it is "imperatively demanded by the necessities of war."²²

Other provisions of the same chapter deal with bombardments. The most important of such provisions is contained in article twenty-five.²³ As originally formulated in 1899, it forbade the bombing of undefended towns or villages. At the 1907 conference some delegates moved to include in this article a list of those particular means of assailing such towns or villages which should be considered forbidden. A counter-motion was then submitted by the French military delegate, General Amourel, who argued that in view of the rapid progress in the technology of war, no particular means should be mentioned and that the prohibition in question should extend to all bombings in order to protect humanity against such means as might be invented in the future.²⁴ This motion was accepted and the article, which is one of the most important in the whole law of war, now reads as follows: "The attack or bombardment, *by whatever means*, of towns, villages, dwellings, or buildings which are undefended is prohibited."²⁵

In the case of a bombardment which is *not* prohibited (one launched against a town which *is* defended), every possible effort shall be made to spare "buildings dedicated to religion, art, science, or charitable purposes . . . provided they are not being used at the time for military purposes."²⁶

The second paragraph of the same article asks the besieged to indicate all edifices or places of this kind "by some particular or visible signs" which, however, are not described. This obvious omission was corrected in the ninth convention, concerning bombardment by naval forces, signed at The Hague on the same day, October 18, 1907.

21. *Id.* §§ 2-3, 36 Stat. 2301-09.

22. *Id.* art. 23, para. g, 36 Stat. 2302.

23. This article appears in the regulations of both 1899 and 1907. Regulations Respecting the Laws and Customs of War on Land, July 29, 1899, art. 25, 32 Stat. 1811 (1903), T.S. No. 403; 1907 Regulations, *supra* note 20, art. 25, 36 Stat. 2302.

24. PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, 3 CONFERENCE OF 1907, 14-15 (J. Scott transl. 1920).

25. 1907 Regulations, *supra* note 20, art. 25, 36 Stat. 2302 (emphasis added).

26. *Id.* art. 27, para. 1, 36 Stat. 2303.

According to the ninth convention, such signs are to be rectangular slabs, each divided into two triangles, one black and one white.²⁷ Other provisions of this convention are similar to those quoted above.

Section three of the regulations appended to the fourth convention of 1907, which establishes the rights and duties of the occupying authorities, requires them to reestablish public order and safety and to respect, in principle, the laws in force in the occupied country.²⁸ The section further forbids any kind of pillage²⁹ and defines those particular categories of public property which may be requisitioned, for strictly military uses.³⁰ As far as immovable public property is concerned, the regulations specifically state that the occupying authority may use public buildings as long as that use does not harm or destroy them.³¹ The regulations also provide that private property is not to be subject to confiscation.³²

Against the background of the above provisions, which have only an indirect bearing on cultural property, the following provision, the last in the regulations of 1907, is certainly the most significant:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.³³

The various provisions discussed above, though perhaps somewhat fragmentary, can, if interpreted and applied in good faith, afford adequate protection to nearly every kind of cultural property against the imminent dangers occasioned by war. Nonetheless, to preclude any contention that some means of injuring the enemy or his property has not been specifically provided for, the following declaration, sometimes referred to as the Martens clause,³⁴ was inserted in the preamble of the fourth convention:

27. Convention with Other Powers Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, art. 5, para. 2, 36 Stat. 2365 (1911), T.S. No. 542.

28. 1907 Regulations, *supra* note 20, art. 43, 36 Stat. 2306.

29. *Id.* art. 47, 36 Stat. 2307.

30. *Id.* art. 53, 36 Stat. 2308.

31. *Id.* art. 55, 36 Stat. 2309.

32. *Id.* art. 46, 36 Stat. 2307.

33. *Id.* art. 56, 36 Stat. 2309.

34. The clause was named after F.F. Martens, Russian jurist and diplomat, who took a major part in drafting the 1899 convention.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.³⁵

This clause and yet another provision of the regulations appended to the fourth convention saying that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited"³⁶ were considered to constitute a sufficient barrier against any unwarranted license on the part of belligerents.

World War I proved, however, how many loopholes a belligerent not acting in good faith could find in the regulations of 1907 by which to escape their application. As a result, some effort was made during the interwar period to supplement the conventions of 1907. The work accomplished pertained to problems of the law of war other than the one with which we are concerned in this paper. The Rules of Air Warfare,³⁷ drafted in 1923, would certainly have been of much avail, but they have never acquired the authority of a formally binding law. Even without them, however, I would argue that article twenty-five of the 1907 regulations, especially if linked with the Martens clause, does provide for adequate protection of cultural property against any attack by aircraft as well. This conclusion, of course, does not mean that efforts should not be made to dot yet more i's and to state explicitly some of the things which can only be inferred from the conventions and regulations of 1907.

An interesting initiative on a regional scale resulted in the signing in Washington on April 15, 1935, of the treaty between the United States and Other American Republics for the Protection of Artistic and Scientific Institutions and Historic Monuments, sometimes referred to as the Roerich Pact.³⁸ This pact introduced the concept of treating the objects concerned as neutral and asking that they be treated with particular "respect and protection" by the belligerents. But this instrument, ratified by only a few American states, does not seem to have had much practical value.

35. 1907 Convention, *supra* note 18, preamble, 36 Stat. 2279-80.

36. 1907 Regulations, *supra* note 20, art. 22, 36 Stat. 2301.

37. See J. SPAIGHT, AIR POWER AND WAR RIGHTS 498-508 (3d ed. 1947).

38. Treaty with Other American Republics for the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267 (1935), T.S. No. 899.

The Convention of 1954

The idea of devoting a special convention to the protection of cultural property like conventions which, since 1864, had been concluded to protect particular groups of persons,³⁹ was aired toward the end of World War I. With the advent of peace, the idea soon fell into oblivion, but it was revived in the thirties by the International Office of Museums (Office International des Musées) in an interesting draft convention.⁴⁰ The draft was under discussion when the outbreak of World War II stopped all negotiations of this type.

In World War II, the Nazi belligerents wantonly destroyed, on an unprecedented scale, not only particular objects of nonmilitary character, but also whole towns, thus causing irreparable damage to the cultural heritage of many nations. They also unscrupulously looted enormous quantities of works of art without regard to ownership.⁴¹

The Allies condemned such proceedings, especially in their joint declaration signed by seventeen governments and the French National Committee and published simultaneously in London, Moscow, and Washington on January 5, 1943.⁴² The declaration became a starting-point for restitutionary action undertaken soon after the war. That action partly succeeded in finding and returning the looted property to its rightful owners. Destruction and pillage of cultural property was mentioned in the case against the major Nazi war criminals before the

39. This trend culminated in the conclusion, in 1949, at Geneva, of four conventions dealing, respectively, with the protection of: (1) the wounded and the sick in war on land; (2) the wounded, the sick, and the shipwrecked in naval war; (3) prisoners of war; (4) the civilian population. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, [1955] 3 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, [1955] 3 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, [1955] 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

40. See OFFICE INTERNATIONAL DES MUSÉES, ART ET ARCHÉOLOGIE 60-70 (No. 2, 1940).

41. Nazi activities of this kind are documented by an extensive bibliography. See, e.g., J. CASSOU, LE PILLAGE PAR LES ALLEMANDS DES OEUVRES D'ART ET DES BIBLIOTHÈQUES APPARTENANT À DES JUIFS EN FRANCE (1947); E. ESTREICHER, CULTURAL LOSSES OF POLAND (1944); J. FLANNER, MEN AND MONUMENTS 220-90 (1947); R. & M. SEYDEWITZ, DIE DAME MIT DEM HERMELIN (1963).

42. See Declaration Regarding Forced Transfers of Property in Enemy-controlled Territory, 8 DEP'T STATE BULL. 21-22 (1943).

Nuremberg International Military Tribunal, and some of the defendants were also tried and found responsible for acts of this kind.⁴³ Some defendants, like Wilhelm Ernest Palezieux, who was tried in Poland for the pillage of Polish cultural property, faced trials before national tribunals.⁴⁴

The pre-war idea of drafting a comprehensive convention dealing specifically with the protection of cultural property in the event of war was then revived on the initiative of the Italian government, under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO). After several years of preparatory work, a diplomatic conference was convened at The Hague in April 1954, and after four weeks of extensive discussion the conference established the ultimate texts for adoption on May 14, 1954.⁴⁵ It should be noted that this conference was, after several years of the so-called Cold War, the first UNESCO meeting attended by representatives of Western and Eastern countries alike. The Third World was still at that stage rather poorly represented.

The instruments signed or voted upon at the conference were:

- (1) Final Act of the Conference;
- (2) Convention for the Protection of Cultural Property in the Event of Armed Conflict⁴⁶ (with Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict annexed thereto);⁴⁷
- (3) Protocol for Protection of Cultural Property in the Event of Armed Conflict;⁴⁸ and
- (4) Resolutions Adopted by the Conference.⁴⁹

43. Göring and Rosenberg were tried for pillage of works of art, among other charges; Keitel was tried for destruction; Frank stood trial on both these counts. See 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF MAJOR WAR CRIMINALS 279-82, 288-91, 293-98 (1949). See also, Nahlik *La Protection*, *supra* note 7, at 115-18.

44. Palézieux was tried before the district court in Cracow in 1948. See NAHLIK, *supra* note 7, at 328; Nahlik, *La Protection*, *supra* note 7, at 116 & n.7, 118.

45. See Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, done May 14, 1954, 249 U.N.T.S. 215.

46. Done May 14, 1954, 249 U.N.T.S. 240 [hereinafter cited as 1954 Convention] (convention containing 40 articles).

47. Done May 14, 1954, 249 U.N.T.S. 270 [hereinafter cited as 1954 Regulations] (regulations consisting of 21 articles).

48. Done May 14, 1954, 249 U.N.T.S. 358 (protocol, consisting of 15 paragraphs dealing only with the problems and procedures of restitution).

49. Done May 14, 1954, 249 U.N.T.S. 236 [hereinafter cited as 1954 Resolutions].

It would be impossible, in the frame of this article, to discuss in detail each of the numerous provisions of the above-listed acts. I shall thus endeavor to draw the attention of the reader to what I consider to be their *principal* advantages and disadvantages.

Advantages

The scope of the protection has been greatly widened. All the older regulations were applicable only to the state of war. The convention of 1954 explicitly provides for application of its provisions in the event of "any other armed conflict" between the parties,⁵⁰ "of partial or total occupation" of territory,⁵¹ and finally, as far as its most important provisions are concerned, of an "armed conflict not of an international character."⁵² The conference's resolution expressed "the hope" that the provisions of the convention would be observed in military actions undertaken under the auspices of the United Nations.⁵³ There are thus no loopholes whatever as to the application of the convention. It applies to armed conflicts of all possible kinds, regardless of the parties and the nature of their conflict.

Another important advantage regarding the scope of the convention concerns the objects to be protected. The regulations of 1907 mentioned several categories, such as "works of art," "historic monuments," and edifices devoted to certain purposes and belonging to various institutions.⁵⁴ A party not acting in good faith, however, could find loopholes among the categories mentioned by which it could avoid the provisions. Nothing of this kind is possible under the 1954 convention.

The very definition of "cultural property," an expression newly introduced by the 1954 convention, covers not merely "movable or immovable property of great importance to the cultural heritage of every people," several categories of which are mentioned by way of example, but also buildings destined to "preserve or exhibit" the movable cultural property, as well as centers containing immovable objects of any of the formerly named categories, such centers being further referred to as "centres containing monuments."⁵⁵ To stress that property is protected by virtue of its intrinsic value, the definition adds that pro-

50. 1954 Convention, *supra* note 46, art. 18, para. 1, 249 U.N.T.S. 254.

51. *Id.* art. 18, para. 2.

52. *Id.* art. 19, para. 1, 249 U.N.T.S. 256.

53. 1954 Resolutions, *supra* note 49, Res. I, 249 U.N.T.S. 236.

54. 1907 Regulations, *supra* note 20, art. 56, 36 Stat. 2309 (1910).

55. 1954 Convention, *supra* note 46, art. 1, 249 U.N.T.S. 242.

tection is granted "irrespective of origin or ownership" of the objects concerned.⁵⁶

In view of the traditional, though now obsolete, notion that specimens from some of the non-European countries are curios rather than works of art, it is noteworthy that according to the parties to the 1954 convention, "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world"⁵⁷

Two further groups of provisions serve to widen the scope of protection. Transports designed to bring cultural property to safety are granted special protection.⁵⁸ Moreover, persons "engaged in the protection of cultural property" shall be respected and as a rule allowed to carry on their duties even after having fallen "into the hands of the opposing Party."⁵⁹

It is essential, of course, that objects entitled to protection be easily recognizable. In contrast to the regulations appended to the fourth convention of 1907, which did not describe what sign should be used to designate cultural property, the convention of 1954 instituted such a sign, though a somewhat complicated one to this writer's mind.⁶⁰ The reader can judge for himself after having read its description:

The distinctive emblem of the Convention shall take the form of a shield, pointed below, per saltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle).⁶¹

Another interesting innovation introduced by the convention of 1954 is the division of "cultural property" into two categories. *All* the objects covered by the conventional definition enjoy ipso facto "general" protection.⁶² *Some* may be entitled to "special" protection.⁶³

56. *Id.*

57. *Id.* preamble, para. 2, 249 U.N.T.S. 240.

58. *Id.* arts. 12-13, 249 U.N.T.S. 250; 1954 Regulations, *supra* note 47, arts. 17-19, 249 U.N.T.S. 286, 288.

59. 1954 Convention, *supra* note 46, art. 15, 249 U.N.T.S. 252.

60. The emblem was drafted by an eminent Polish architect who was the reporter of the special subcommittee. He explained to me that because all simpler signs already had other meanings, especially as traffic signals, none of them could be used for identifying cultural property.

61. *Id.* art. 16, para. 1. For further provisions concerning the emblem and its use see *id.* art. 17, 249 U.N.T.S. 254, 1954 Regulations, *supra* note 47, arts. 20-21, 249 U.N.T.S. 286, 288.

62. 1954 Convention, *supra* note 46, arts. 2-7, 249 U.N.T.S. 242, 244, 246.

63. *Id.* arts. 8-11, 249 U.N.T.S. 246, 248, 250.

The conditions which must be met for objects to be granted this special protection are not easily fulfilled. Only objects of "very great importance," immovables in principle, especially "centres containing monuments" and "refuges intended to shelter movable cultural property," can aspire to special protection, and even these objects are protected only if they

(a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication; [and]

(b) are not used for military purposes.⁶⁴

The above conditions were much discussed. Professor Lorentz, the delegate of the Polish government, remarked that of the really outstanding monuments, perhaps only the Egyptian pyramids are likely to be granted the special protection without reservation.⁶⁵ In view of this and other similar observations made in the course of discussion, an additional paragraph⁶⁶ was formulated according to which an object not fulfilling all the conditions listed in the above quoted subparagraph (a) can nevertheless be granted special protection if the party seeking it undertakes not to use either the object in question or vulnerable objects in its vicinity, such as ports and aerodromes, in the event of an armed conflict.

All these specifications are but prerequisites to the formal entry of the object in question into the *International Register of Cultural Property under Special Protection*, to be maintained by the director-general of UNESCO.⁶⁷ Notification of a request for registration must be given to all other parties to the convention.⁶⁸ The dispute will normally proceed to arbitration. If a nation objects, the issue is submitted to a vote of the parties, and if two-thirds concur in the objection, the registration is stricken.⁶⁹ No specific means of injuring cultural property have been specified to prevent a party from eluding its obligations under the convention. The document merely states, in very nonspecific terms,

64. *Id.* art. 8, para. 1, 249 U.N.T.S. 246.

65. INTERGOVERNMENTAL CONFERENCE ON THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT, RECORDS OF THE CONFERENCE CONVENED BY THE U.N. EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION HELD AT THE HAGUE FROM 21 APRIL TO 14 MAY 1954, at 170 (1961).

66. 1954 Convention, *supra* note 46, art. 8, para. 5, 249 U.N.T.S. 248.

67. 1954 Regulations, *supra* note 47, art. 12, 249 U.N.T.S. 276, 278.

68. *Id.* art. 13, 249 U.N.T.S. 278.

69. *Id.* art. 14, paras. 7-8, 249 U.N.T.S. 280.

that property entitled to general protection shall be safeguarded and respected.⁷⁰ The former term includes protective measures taken by the state in whose territory the object in question is situated "against the foreseeable effects of an armed conflict."⁷¹ The obligation to "respect" cultural property primarily, though not exclusively, concerns the opposing party.⁷² The party shall not direct against such property "any act of hostility."⁷³ It shall further prohibit any form of "theft, pillage or misappropriation" of cultural property and shall refrain from any reprisals against it.⁷⁴

As to property placed under special protection, the obligations of the parties have been formulated more concisely. Parties shall refrain from "any hostility directed against such property," and, with one exception, from "any use of such property or its surroundings for military purposes."⁷⁵ The very term "immunity," perhaps borrowed from diplomatic law, may imply, by way of analogy, that property of this kind is to be considered as "extraterritorial."

It is noteworthy how, under the above mentioned provisions, the convention endeavors to impose the burden of protecting cultural property equally upon *both* parties to a conflict. It is, however, doubtful whether these provisions do indeed create a proper balance.

More provisions have been formulated to ensure the proper application of the convention than of any other act of a similar kind. Most of the measures concerned are to be taken by each of the parties. Each shall properly instruct its own military forces and establish within such forces specialized services for protection of cultural property.⁷⁶ Each shall provide for the dissemination of the text of the convention among its own people by measures which include study of the text in both military and civilian training programs.⁷⁷ Each party shall provide for proper penal sanctions against those who breach the convention.⁷⁸ It is also recommended that each set up a special advisory body to counsel the government as to what particular measures should be taken for the implementation of the convention.⁷⁹

70. 1954 Convention, *supra* note 45, art. 2, 249 U.N.T.S. 242.

71. *Id.* art. 3.

72. *Id.* art. 4, 249 U.N.T.S. 242, 244.

73. *Id.*

74. *Id.*

75. *Id.* art. 9, 249 U.N.T.S. 248.

76. *Id.* art. 7, 249 U.N.T.S. 246.

77. *Id.* art. 25, 249 U.N.T.S. 258.

78. *Id.* art. 28, 249 U.N.T.S. 260.

79. 1954 Resolutions, *supra* note 49, Res. II, 249 U.N.T.S. 236.

Much is also to be undertaken on an international scale. Parties must submit reports to the director-general of UNESCO on what they have done to implement the convention.⁸⁰ The director-general may convene meetings from time to time so that the parties may exchange information and consult as to further implementation of the convention, by means which may include its revision.⁸¹

In the event of an armed conflict, commissioners-general are to be appointed, possibly by the opponents in common, and the commissioners in each of the belligerent countries shall control if and how the convention is to be observed.⁸² They are to be chosen from a list of qualified persons compiled by the director-general of UNESCO, who will act with the commissioners as an intermediary between the parties in any matter that may concern the implementation of the convention,⁸³ since no special international organization has been created for this purpose. Finally, the institution of the protecting powers,⁸⁴ taken from traditional international law, is to assist the belligerents in their mutual relations during an armed conflict for the purpose, among others, of protecting their cultural heritages.

Disadvantages

The treatment by the conference of the problem of restitution does not seem satisfactory. This problem has perhaps a richer history than any other pertaining to our subject.⁸⁵ Since 1648, there has hardly been a peace treaty *without* some provisions concerning restitution. The previously-mentioned restitution in 1815 of works of art looted in the Napoleonic wars set another precedent, famous all over the world. More recently, the best-known provisions were those of the peace treaties concluded in 1919 at Versailles⁸⁶ and Saint-Germain-en-Laye⁸⁷ with Germany and Austria, respectively and, after World War II, those of

80. 1954 Convention, *supra* note 46, art. 26, para. 2, 249 U.N.T.S. 260.

81. *Id.* art. 27. In Resolution III, the conference expressed the wish that a first meeting of this kind be convened soon after the convention entered into force. See note 49 *supra*.

82. 1954 Regulations, *supra* note 47, arts. 1, 4, 249 U.N.T.S. 270, 272.

83. 1954 Convention, *supra* note 45, art. 23, 249 U.N.T.S. 258.

84. *Id.* arts. 21-22, 249 U.N.T.S. 256, 258.

85. See generally, NAHLIK, *supra* note 7; Hall, *The Recovery of Cultural Objects Dispersed During World War II*, 25 DEP'T STATE BULL. 337 (1951); Nahlik, *La Protection*, *supra* note 7, at 77-81, 85-86, 99-102, 111-14.

86. Treaty of Versailles, June 28, 1919, arts. 245-47, 11 Martens Nouveau Recueil (ser. 3) 323, 514-16.

87. Treaty of St. Germain en Laye, Sept. 10, 1919, arts. 191-96, 11 Martens Nouveau Recueil (ser. 3) 692, 754-55 (peace treaty with Austria).

1947 concluded with Italy⁸⁸ and other Axis countries. All of these treaties provided for restitution of cultural property taken from the country of origin. Some went even further, placing on the party concerned the obligation of also returning objects which had been looted in former wars. If the original object could not be found, the guilty party had to deliver objects similar in kind and value.

In the original draft convention prepared before the 1954 conference, provisions on restitution were equivalent to other provisions of the draft. Strangely enough, the International Institute for the Unification of Private Law, when asked for advice on the subject, said that the existing differences between various civil laws made it very difficult to formulate provisions acceptable to all.⁸⁹ It was then decided to put all provisions on restitution in a separate protocol, which countries could choose to accept or reject independently from the convention. As to the contents of the protocol,⁹⁰ emphasis was put not on the civil law issues but rather on those pertaining to administrative law. All objects taken from a territory are to be returned to its government, regardless of who actually owns them. A special clause provides for indemnification of holders in good faith of such objects.

There is nothing revolutionary in this procedure; indeed, very few countries, when ratifying or acceding to the convention, failed to accept the protocol as well. But the very fact that restitution has been dealt with in a separate act may create the impression that there is something optional about it, whereas to the contrary, hardly any other set of rules pertaining to our subject is as deeply rooted in the already previously existing customary law.

Sanctions have been dealt with in one brief article, by virtue of which the parties

undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.⁹¹

This provision seems to be far too general. One can conceive of many different ways of violating the convention.⁹² To leave *every* detail

88. Treaty of Peace with Italy, Feb. 10, 1947, art. 75, 61 Stat. 1245, 1282 (1947), T.I.A.S. No. 1648, 49 U.N.T.S. 3.

89. UNESCO Doc. CBC/6 (1954).

90. Protocol for Protection of Cultural Property in the Event of Armed Conflict, done May 14, 1954, paras. 1-5, 249 U.N.T.S. 358.

91. 1954 Convention, *supra* note 45, art. 28, 249 U.N.T.S. 260.

92. According to the results of this writer's analysis, there are thirty possible of-

that concerns sanctions to each party must necessarily bring about too great a diversity in the rules adopted by the various states. It would have been far better for the convention to have given the parties some guidance. As early as 1954, the United Nations Commission of International Law had prepared a draft code of offenses against the peace and security of mankind.⁹³ This work had ground to a halt because the United Nations' members could not agree on a definition of "aggression," which was to constitute a major, indeed the most serious, offense in the code. Nevertheless, since a definition was finally adopted in 1974,⁹⁴ the work on the draft code may be resumed. A codification of offenses against cultural property could be initiated as well.

Although to a lesser extent than in several former conventions, some disquieting limitations on the effectiveness of the convention have been introduced. Two of these limitations seem by far the most important.

First, even though, as noted above, reprisals against any cultural property have been, as such, prohibited,⁹⁵ the following provision suggests the contrary:

If one of the High Contracting Parties commits, in respect of any item of cultural property under special protection, a violation of the obligations under Article 9,⁹⁶ the opposing Party shall, so long as this violation persists, be released from the obligation to ensure the immunity of the property concerned.⁹⁷

Although cautiously worded, this provision can hardly be considered as something other than an authorization of steps which may prove to be tantamount to reprisals.

The second major limitation concerns the inclusion of a clause allowing the waiver of immunity in case of military necessity. In 1899, the German delegation insisted⁹⁸ on inserting not only a "necessity of war" clause into the provision dealing with destruction or seizure of

fenses against various provisions of either the regulations of 1907 or the convention of 1954. See Nahlik, *Des Crimes contre les biens culturels*, 29 ANNUAIRE DE L'ASSOCIATION DES AUDITEURS ET ANCIENS AUDITEURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 14, 24-27 (1959); Nahlik, *La Protection*, *supra* note 7, at 149-53.

93. Int'l L. Comm'n, Report, 9 U.N. GAOR, Supp. 9, U.N. Doc. A/2693 (1954).

94. G.A. Res. 3314, 29 U.N. GAOR Supp. 31, at 143, U.N. Doc. A/9631 (1974).

95. See notes 72-75 & accompanying text *supra*.

96. This article, mentioned above, speaks in terms of the "immunity" of property under special protection. See note 75 & accompanying text *supra*.

97. 1954 Convention, *supra* note 45, art. 11, para. 1, 249 U.N.T.S. 248.

98. The principal speaker on behalf of Germany was Colonel Gross von Schwarzhoff. See PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, CONFERENCE OF 1899, 424, 428 (J. Scott transl. 1920).

enemy property, but also a general clause concerning "military necessity" into the preamble of the convention. Both these clauses, which the other states reluctantly accepted, in order not to discourage Germany from becoming a party to the convention, passed almost automatically into the 1907 convention as well.⁹⁹

In the original draft convention submitted to the 1954 conference, there was no provision of this kind. The role which the German delegation had played in 1899 and 1907 was, however, assumed by the United States delegation, which, soon seconded by the British delegation, claimed that the military necessity clause was indispensable. Many delegates, all those of the Socialist countries and several of the Western representatives as well,¹⁰⁰ opposed such a clause but had to yield for the delegates of the Anglo-Saxon countries made it perfectly clear that unless it was included, they would not accept the convention as a whole.¹⁰¹

The clause has been formulated differently for each of the two circles of protection. With respect to property entitled to the general protection only, the obligations of the parties "may be waived only in cases where military necessity *imperatively* requires such a waiver."¹⁰² The provision regarding objects under special protection is more elaborate:

[I]mmunity shall be withdrawn from cultural property under special protection only in exceptional cases of *unavoidable* military necessity, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity.¹⁰³

This provision seems to be extremely dangerous. Is there essentially much difference, except in words, between an imperative necessity

99. 1907 Convention, *supra* note 18, preamble, 36 Stat. 2279; 1907 Regulations, *supra* note 19, art. 23(g), 36 Stat. 2302.

100. Delegates of France, Greece, Spain, San Marino, and Ecuador opposed the motion.

101. A lengthy discussion on military necessity, initiated by Colonel Perham of the United States delegation, took place at the third, fourth, fifth, ninth and thirteenth meetings of the Main Commission, and at the fifth and ninth plenary meetings. See INTER-GOVERNMENTAL CONFERENCE ON THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT, RECORDS OF THE CONFERENCE CONVENED BY THE U.N. EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION HELD AT THE HAGUE FROM 21 APRIL TO 14 MAY 1954, at 140-54, 176-80, 207-10, 214-19, 281-82 (1961).

102. 1954 Convention, *supra* note 45, art. 4, para. 2, 249 U.N.T.S. 244 (emphasis added).

103. *Id.* art. 11, para. 2, 249 U.N.T.S. 250 (emphasis added).

and an unavoidable necessity? In view of the modern technology of war, is not a temporary withdrawal of immunity sufficient for making a "centre containing monuments" a ruin? Let us hope that at least the commander of a division will know enough about art history not to destroy an object of major importance.

A further disadvantage, minor in comparison with those already mentioned, is the lack of a specialized body entrusted with the mission of overseeing the implementation of the convention. The original Italian proposal provided for such a body, but the idea was dropped because the prevailing opinion at the time was that there were already too many international organizations and that it should be sufficient to place the convention under the auspices of UNESCO. This solution hardly proved to be a happy one. The tasks of UNESCO are multifarious. The 1954 convention was but one of many items in its program. The Monuments Division of that organization certainly furnished considerable help in the preparation of the convention, but once the convention was concluded, it was left largely at the mercy of each of the parties. In 1962, a meeting of the parties was convened by UNESCO,¹⁰⁴ but the organization, or, to be precise, its Secretariat, seemed to consider UNESCO's functions to be purely technical. The 1962 meeting unanimously adopted a resolution asking for the establishment of a committee of experts with more substantial functions, but the organs of UNESCO paid no attention to the wish of the parties represented at the meeting.

Concluding Remarks

Sixty-six countries ratified or acceded to the convention, among them nearly all those of Europe and many of Latin America. Each year brings some accessions of African and Asian countries, a majority of which were not yet independent in 1954. On the other hand, the convention has not, so far, been ratified or acceded to by even one of the Anglo-Saxon countries. This situation would seem particularly unfair, as many important provisions of the convention, of which those on military necessity are the most striking examples, were given their final formulation because of a kind of moral pressure from either the United States, or Great Britain, or both these countries.

At the 1962 meeting, many parties reported having already introduced legislative or administrative measures for the implementation of

104. See generally UNESCO Doc. CUA/120 (1962).

the convention. Some have instituted national advisory committees, as recommended by the conference. Commissioners-general, as provided for by the Regulations for the Execution of the Convention, were instituted in the recent Middle East conflict, the only case so far.

Very few entries are to be found in the International Register maintained by the director-general of UNESCO. Most countries are probably reluctant to declare that objects in the vicinity of those under special protection shall not be used in the event of an armed conflict. Still, the few entries already made are significant. For example, the Vatican City (Citta del Vaticano) was entered into the register as a whole. The depository of the convention and all the parties to it agreed to this entry after the Italian government had merely declared that, in the event of an armed conflict, it would renounce the use of only one street: the Via Aurelia, in so far as that street runs along the Vatican walls.¹⁰⁵ One can infer from this precedent that the distance between the protected object and its "vulnerable" neighbors need not be very great.

A further meeting of the parties would certainly be advisable. At such a meeting, a revision of the convention could perhaps be undertaken in order to correct at least some of the disadvantages analysed above.

One should remember, first and last, that the conventional protection and its possible suspension, for whatever reason, should not be considered too narrowly as a problem involving only two states at war at a given moment. Whenever an object of supreme quality is concerned, its preservation for future generations is a matter of concern for the whole of humanity.

105. See generally LA PROTEZIONE DEI BENI CULTURALI IN CASO DI CONFLITTO ARMATO 47-51 (A. Malintoppi ed. 1966).

